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IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

On Petitions for Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

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July 12, 2002

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QUESTIONS PRESENTED

1. Is the decision by the Supreme Court of Appeals of West Virginia (West Virginia Supreme Court), which remands the case for further proceedings consistent with recognized decisions by the Supreme Court of the United States, a "final judgment" as contemplated by 28 U.S.C. § 1257(a)?

2. Are there "compelling reasons" for the Supreme Court of the United States to grant a writ of certiorari to review a decision of the West Virginia Supreme Court which decision is not within the parameters set forth in Rule 10[1]?

3. Are there compelling reasons for the Supreme Court of the United States to grant a writ of certiorari to review a decision of the West Virginia Supreme Court which would require the Court to review, *de novo,* a voluminous record designated by the parties from the lower court and require the Court to substitute its judgment for that of the West Virginia Supreme Court which decided the matter on a 5 - 0 vote?

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[1] Reference is made to U.S. Supreme Court Rule No. 10, "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI."

PARTIES TO THE PROCEEDINGS

The following are parties to the proceedings below:

(1) Plaintiff, Ms. Charlotte Pritt, a school teacher and the Democratic nominee for Governor of West Virginia in the 1996 general election.

(2) Defendant, the Republican National Committee (RNC), the national Republican party official organization under the United States Federal Election Commission (FEC).

(3) Defendant, the National Republican Senatorial Committee (NRSC), a political committee registered with the FEC under FECA. It is devoted to the election of Republican candidates to the United States Senate.[2]

(4) Defendant, the West Virginia State Victory Committee (WVSVC), the alter-ego of the NRSC, having common employees as officers and a common address. It was organized by the NRSC in October 1996 and registered with the W. Va. Secretary of State on October 4, 1996. Its sole purpose and function was to air political advertisements against the Plaintiff. The WVSVC was dissolved by the NRSC on April 6, 1998.

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[2] *Federal Election Commission v. National Republican Senatorial Committee,* 761 F. Supp. 813, 816 (D.D.C. 1991).

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BRIEF IN OPPOSITION

This Brief is in opposition to two Petitions for writ of certiorari for review of a 5-0 decision rendered by the Supreme Court of Appeals of West Virginia (West Virginia Supreme Court) in the case of *Charlotte Pritt v. The Republican National Committee, et al.*, 557 S.E.2d. 853 (2001).

I. OPINIONS BELOW:

There are three decisions which have been generated by this case to date, namely:

(1) *Pritt v. The Republican National Committee, et al.*, 1 Fed.Supp.2d 590 (1998), whereby the District Court remanded the case back to Fayette Circuit Court on April 16, 1998.
(2) Fayette Circuit Judge Vickers' order granting Petitioners' Motion for Summary Judgment on May 15th, 2000.[3]
(3) The 5-0 decision by the West Virginia Supreme Court, filed December 12, 2001, 557 S.E.2d. 853 (2001), which reversed Judge Vicker's decision on the basis of the Court's *de novo* review of the record.[4]

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[3] See page 25a of the Appendices of both Petitioners' Petition.

[4] A copy of this decision is included in both of Petitioners' Petitions as "Appendix A". Respondent's Brief will refer to page numbers in Petitioners' "Appendix A", the West Virginia Supreme Court decision. E.g. 1a is the first page of the decision.

II. JURISDICTION:

The Petitioners' section on "Jurisdiction" does not accurately portray the West Virginia Supreme Court decision, the facts of the case or the applicable law as to the question of jurisdiction.

Petitioners contend that the decision of the West Virginia Supreme Court is a "final judgment" as contemplated by 28 U.S.C. § 1257(a) and should be reviewed by a writ of certiorari. Respondent disagrees with this and contends that the West Virginia Supreme Court decision is not a "final judgment".

Black's Law Dictionary defines "final judgment".

> "***Final Judgment*** **is one which puts an end to a suit".**[5]

The subject case was remanded by the West Virginia Supreme Court for trial under guide lines consistent with prior decisions. No "final judgment" was rendered. The further proceedings provided for will give both parties ample opportunity to fully develop their positions and their respective portions of the case.

> "Under 28 U.S.C. § 1257, this Court has jurisdiction to review only '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' Because the Colorado Supreme Court, 633 P.2d 455, remanded this case

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[5] *Blacks Law Dictionary, Third Edition,* page 1027.

> for trial, its decision in not final 'as an effective determination.'"
> *O'Dell, et al. v. Espinoza, et al.,*
> 456 U.S. 430, (1982)

Petitioners cite several decisions as "exceptions" to the "final judgment" rule. What transpired in the lower court and the West Virginia Supreme Court does fall in any of these "exceptions".

ASARCO Inc., et al. v. Kadish, et al., 490 U.S. 605 (1989), presented a constitutional challenge to Ariz. Rev. Stat. Ann. 27-234(B). The Court reviewed and reversed the Arizona Supreme Court decision that decided the subject statute was constitutional. The Court noted two "exceptions" to the "final judgment or decree" rule.

> (1) Where "the federal issue is conclusive" and "the outcome of further proceedings pre-ordained" and,
>
> (2) the federal questions that could come to this Court have been adjudicated by the state court, and the remaining issues will not give rise to any further federal question.

Our present case does not involve the constitutional challenge of a state statute and does not fall within this two part exception.

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) involved "freedom of the press".

The father of a rape victim brought a civil action against the Broadcasting company on the basis that they had violated the Georgia "rape shield" statute by publishing the name of his daughter. The trial court

granted a summary judgment in favor of the father since there were no issues as to the facts. The Broadcasting company contested the constitutionality of the statute since the name of the victim was a matter of public record. The Georgia Supreme Court affirmed the lower court and remanded for further proceedings.

Following a "pragmatic approach" the Court reviewed the case on Certiorari as a "final decision or decree" of the states' highest court involving a state statute that may be in conflict with the First and Fourteenth Amendments. The state statute imposed sanctions on a television company that had accurately reported judicial records maintained in connection with prosecution. These records were a matter of public information.

Our present case clearly does not fall inside the frame work of the *Cox "exception"* which involves the constitutionality of a state statute.

In *Miami Herald Company v. Tornillo,* 418 U.S. 241 (1974) "freedom of the press" was the issue. The Florida statute in question required newspapers which "assail the character of a political candidate" to afford free space for reply by that candidate. The lower court ruled that the statute was unconstitutional. The Florida Supreme Court reversed the lower court and remanded for further proceedings.

The Court considered the Florida Supreme Court's decision as a "final decision" and reversed. The constitutionality of a statute was the pivotal issue of the civil claim. The Florida Supreme Court had made what amounted to a "final decision" in

this regard and had remanded the case to go forward on that premise.

In our present case we do not have the constitutionality of a statute at issue.

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) is cited for the proposition that the First Amendment protection is a "federal policy" which merits exception to the "final decision" rule. In that case, the Indiana RICO statute was challenged by the defendant's claim that its First Amendment rights had been denied. *Fort Wayne Books* had been charged with repeated violations by distribution of obscene matter which was treated as a pattern of conduct and in violation of the RICO statute. Upon certification, the Indiana Supreme Court ruled the statute constitutional.

The Court affirmed the decision and stated that it was appropriate to review the case "[W]here the federal issue has been finally decided in the state courts..." In our present case, the West Virginia Supreme Court did not finally decide any federal issue.

Again, we have a state statute involved. The above citation does not apply to our present case.

All four decisions cited by Petitioners involve challenge to the U. S. Constitution by a state statute.

Court's Rule 10, "Considerations Governing Review on Certiorari" is very instructional as to when the Court would be expected to exercise its discretion to review on certiorari. "A petition for a writ of certiorari will be granted only for compelling reasons."

This case does not satisfy Rule 10 in that we do not have a situation where a "state court of last resort has decided an important question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" as provided by Rule 10(b).

Nor do we have a situation where "a state court...has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." as provided by Rule 10(c).

The West Virginia Supreme Court merely addressed the propriety of a lower court's summary judgment and remanded with guidance consistent with decisions of the Supreme Court of the United States.

Finally, at this juncture of the case, with no "final judgment" having been rendered, with prospects that both parties will have full opportunity to develop their respective portions of the case, with prospects that there will be opportunities for both parties to seek review in the future by the Court of any constitutional questions that may arise and the fact that Petitioners have lost no rights nor suffered any detriment at this time, there is **no compelling reason** the Court should review this case.

A review of this case should not be granted merely on Petitioners' speculation that in the future, they may be denied some constitutional protection.

III. CONSTITUTIONAL PROVISIONS:

Respondent agrees with Petitioners that the First and Fourteenth Amendment to the United States Constitution are involved in this case. Respondent does not agree, however, with Petitioners' speculation that by allowing this case to go forward, a conflict with these Amendments will develop. Quite the contrary, Respondent is of the opinion that it is necessary to allow this case to go forward to protect Respondent's rights under the Fourth Amendment.

We must also consider the Constitutional mandate that provides for the election of government officials. False advertisements about the Respondent misinformed the electorate. A misinformed electorate is effectively disenfranchised. This defeats the "election of government officials" principle. The principle of "governed by the consent of the governed" is effectively nullified by a misinformed electorate.

IV. STATEMENT OF THE CASE:

This case is a common law libel action by a nominee for a state office against two national political organizations which, on the eve of an election, fabricated, paid for and arranged for the broadcasting of a series of "negative ads" about Respondent that were false and misleading.

The action below is not against the Respondent's opponent, who disavowed the subject advertisements and ask that they be terminated.

The action below is not against any element of the media and hence "freedom of the press" is not an issue.

The action below has been prosecuted solely by Respondent as an individual and no political organizations of any nature have contributed to its prosecution, financially, technically or in any other manner.

Respondent, Charlotte Pritt, was a school teacher with 17 years experience in the public school system. She was a former member of the House of Delegates and the State Senate and was the Democratic nominee for Governor in the 1996 West Virginia general election. On the eve of the election, Petitioners fabricated and published a series of false negative advertisements about Respondent that libeled, slandered and defamed her. These advertisements were broadcast 106 times in Fayette County by two Fayette County radio stations. The advertisements were also broadcast state wide by five television stations and seventeen radio stations.

Respondent brought the subject libel action in state court (Circuit Court of Fayette County, West Virginia) on October 31, 1997. This libel was based on the false and misleading political advertisements which were arranged for by NRSC through its alter-ego, the West Virginia State Victory Committee (WVSVC).

The political advertisements at issue were each identified in a Report filed with the West Virginia Secretary of States Office by the Petitioners' media services (Mentzer Media) as "ad(s) opposing Pritt". Collectively, hereafter, reference will be made to the

"Ads opposing Pritt" or the "Ads" and include all the television and radio advertisements that Respondent has identified from the required Reports made to the Secretary of State.

Petitioners immediately removed the case to the District Court for the Southern District of West Virginia which remanded the case back to Fayette Circuit on April 16, 1998. The Fayette Circuit Court set a trial date of June 5, 2000.

On June 15, 1999, pursuant to W. Va. R. Civ. P. Rule 56[6], Petitioners filed a Motion for Summary Judgment. Oral hearing was held by the Fayette Circuit Court on August 26, 1999. By order dated May 15, 2000, the court granted summary judgment.

Respondent petitioned for and was granted an appeal by the West Virginia Supreme Court on December 8, 2000. The court heard oral arguments on October 3, 2001 and by 5-0 decision, entered on December 12, 2001, reversed the lower court's decision granting summary judgment.

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[6] W.Va.R.Civ.P. Rule 56(c) provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."** (Emphasis provided)

V. SUMMARY OF ARGUMENT:

Respondent's argument includes the following points:

1. Respondent disputes Petitioners' argument that there is jurisdiction for review of this case under a writ of certiorari. This is addressed in the "JURISDICTION" section of this Brief .
2. Respondent disputes Petitioners' argument that the West Virginia Supreme Court failed to independently review the record.
3. Respondent disputes Petitioners' argument that there is no evidence as to the falseness of the "Ads opposing Pritt"
4. Respondent disputes Petitioners' argument that there is no evidence as to the "actual malice" of the Petitioners in publishing the "Ads opposing Pritt".
5. Respondent disputes Petitioners' argument that this case poses a serious and imminent threat to the First Amendment that requires it be reviewed under a writ of certiorari.

VI. ARGUMENT:

Repondent's argument which follows is not in anyway to be interpreted as deprecating the serious concerns Respondent has with the question of jurisdiction .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which is noted twice in the West Virginia

Supreme Court decision, is of great precedential value to our present case. Liberty Lobby brought a libel action in D.C. District Court against Jack Anderson, publisher of the "Investigator" which published three articles about founder Willis Carto. This action alleged the articles contained 28 statements and 2 illustrations that were false and derogatory. On motion by defendant, under Rule 56, the District Court granted summary judgment. The Court of Appeals affirmed in part and reversed in part. The U. S. Supreme Court reversed the Court of Appeals and remanded the case for further proceedings. At page 247 the Court stated:

> "More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

At pages 247/248 the Court further stated:

> "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

In *Anderson v. Liberty Lobby*, at page 250, the Court notes the role of the jury as to the issue of "credibility":

> "Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge whether he is ruling on a motion for summary judgment or for a directed verdict."

Credibility of Petitioners and those working for them is an important aspect of Respondent's proof that the "Ads opposing Pritt" were false negative ads that were spawned in a stream of deception.

At least seven areas of deception by Petitioners can be identified relative to the "Ads opposing Pritt".

(1) In order to convince them to broadcast the "Ads", Petitioners' political consultant, David Welch (Welch) sent a letter to the various TV and Radio stations prior to their broadcast that distorted Respondent's legislative record.

(2) Shortly after the "Ads" commenced, Petitioners' Welch, the author of the "Ads", made a false statement to the press that the "Ads" were paid for by West Virginia donors.

(3) The "Ads" indicated that they were paid for by the WVSVC when in fact they were paid for by a loan that the NRSC received from Signet Bank.

(4) The use of WVSVC as an alter-ego of the NRSC hid the real identity of the Petitioners and projected a

false image that the "Ads" were produced by West Virginians.
(5) The "Ads" purported to set forth Respondent's legislative record when in fact they were a gross distortion of the record that reached absurd results and omitted significant parts of her record which deceived the voting public.
(6) Twelve days after the election, Welch, falsely stated to the press that "the state business community decided to do the independent advertising campaign against Pritt."
(7) On deposition, Welch professed that the "Ads" were an effort to truthfully report Respondent's record yet he admitted that he used the **"part of the voting record that perhaps would be most important to the people who are sponsoring the ad."**

The sin of "omission" can be as great and as effective as the sin of "commission" when the design of the actor is to deceive.

Argument in Response to RNC:

As required by law, the West Virginia Supreme Court reviewed the designated record *de novo,* considered the parties' briefs and conducted an oral hearing on October 3, 2001 and, on December 12, 2001, the Court unanimously decided that the lower court's decision should be reversed on the basis that that there were genuine issues of material fact which should be presented to a jury.

The Court remanded the case back to the Circuit Court of Fayette County for further proceedings and provided a survey of the applicable law as guidance

for continuation of the litigation including *New York Times v. Sullivan*[7], *Anderson v. Liberty Lobby*[8], *Harte-Hanks Communications, Inc. v. Connaughton*[9], *St. Amant v. Thompson*[10], *Masson v. New Yorker Magazine, Inc.*[11], *Sprouse v. Clay Communications*[12], *Hinerman v. Daily Gazette Co. Inc.*[13], *Long v. Egnor*[14], *Maynard v. Daily Gazette Co.*[15] and *Suriano*[16].

The following are misleading representations made by the RNC in their Petition concerning the West Virginia Supreme Court decision:

(1) At page 11, line 10 of their petition, the RNC states that "the Supreme Court of Appeals failed to conduct an 'independent review' of the record to assure that it contained the requisite clear and convincing evidence of actual malice." In the West Virginia Supreme Court decision at page 10a, line 5 the Court stated:

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[7] *New York Times Co. v.* Sullivan, 376 U. S. 254 (1964).
[8] *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986)
[9] *Harte-Hanks Communications Inc. v. Connaughton,* 491 U.S. 657 (1989).
[10] *St. Amant v. Thompson,* 390 U.S. 727, (1968).
[11] *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991).
[12] *Sprouse v. Clay Communications, Inc.,* 211 S.E. 2d. 674 (1975).
[13] *Hinerman v. Daily Gazette Co.,* , 423 S.E.2d 560 (1992)
[14] *Long v. Egnor,* 346 S.E.2d 778 (1986)
[15] *Maynard v. Daily Gazette Co.,* 447 S.E.2d 293 (1994)
[16] *State ex rel. Suriano v. Guaghan,* 480 S.E.2d 548 (1996)

> "Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law."

The challenged decision (and "Syllabus by the Court") makes reference to "clear and convincing" or "convincing clarity" **no less that ten times**. It can hardly be said that the West Virginia Supreme Court ignored or was unmindful of this principle.

(2) At page 19, line 11, the RNC states "Although the court recognized the general applicability of this heightened standard of proof, it deemed the standard 'no longer relevant' because the case 'cannot be disposed of summarily. App. 20a n. 14.'"

This footnote concerned the West Virginia Supreme Court's discussion as to whether "falsity must be shown by clear and convincing evidence." What the Court actually said was:

> "Although no longer relevant to the instant proceeding given that this case cannot be disposed summarily, we note that a public official opposing a summary judgment must **establish his/her *prima facie* case of defamation, and the elements thereof, by clear and convincing evidence**." (emphasis supplied).

By deleting this section of the footnote, the Petitioner totally reversed what the Court said.

(3) Again, at page 21, line 10, the RNC restated this distortion of footnote 14 in support of the proposition that the West Virginia Supreme Court failed to observe the requirement of proof by "clear and convincing evidence" placed on a public figure.

(4) At page 23, line 11, the RNC stated, "As noted above, the West Virginia court conducted no factual review and failed to apply the proper evidentiary standard." What the Court said at page 15a, line 12 was, "With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury." How can the Petitioner conclude the "court conducted no factual review".

Argument in Response to NRSC:

In support of their Motion for Summary Judgment and in support of their Petition for Writ of Certiorari the NRSC contends that the "Ads opposing Pritt" were truthful. An example of this oft repeated theme is at page 7, line 12 of the NRSC's Petition. "Mr. Welch believed that the statements in the advertisements were '[a]bsolutely truthful' and presented a 'fair and accurate portrayal of [Respondent's] voting record' on each one of the bills and amendments at issue."

At page 7, line 29, "Having completed his independent review, Mr. Engle was satisfied that the advertisements 'truthfully portrayed' both the legislation at issue and Respondent's vote on that legislation."

The NRSC's proof of "truthfulness" includes only (1) statements made by Welch in his deposition taken by the Respondent, (2) Craig Engle's affidavit and (3) distortions of answers by Respondent in her deposition. Other than this, Petitioners had no proof in regard to their defense that the "Ads opposing Pritt" are true. Petitioners, through Welch and Engle, were the "fabricators" of the "Ads opposing Pritt", as distinguished from merely repeating the allegations in the "Ads" such as a newspaper reporter would do.

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact (a jury) must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to prove persuasive, for example, where a story is **fabricated** by the defendant, is the product of his **imagination**..." (Emphasis/ parenthesis added). *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

The definition of falseness is no mystery. In *Masson v. New Yorker Magazine,* 501 U.S. 496, 517 (1991) the Court answers "the question on falsity".

> "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts 563, Comment c (1977); W.

> Keeton, D. Dobs, R. Keeton & D. Owen, Proser and Keeton on Law of Torts 766 (5th ed. 1984)....Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"

As the allegations in the "Ads opposing Pritt" are compared, on a one by one basis, with Respondent's legislative record on the subjects, we are left with the inescapable conclusion that the allegations in the "Ads" "have a different effect on the mind of the" listener or viewer "from that which the pleaded truth" of the record would produce.

Petitioners postulate that the lower Court's decision is in some manner superior to that of the West Virginia Supreme Court. What they don't tell us, however, is that Judge Vickers did not write the order granting summary judgment. Judge Vickers simply entered an order that Petitioners prepared and submitted without solicitation, approximately six months earlier.

In the pre-trial hearing on May 11, 2000, four days before entry of the order granting summary judgment, Judge Vickers expressed concern about "not having a clerk...the volume of the materials contained in the case" and it being "a little bit troubling to the Court when we've got to, in essence try these cases twice, oftentimes." His entry of summary judgment was not based on independent review of the record but instead was motivated by a desire to send the

case to the West Virginia Supreme Court and get the benefit of their ruling to avoid "try(ing) these cases twice".[17]

Throughout their Petition, the NRSC attacks the West Virginia Supreme Court decision with the proposition that the Court did not conduct an independent review of the record below. This is without merit.

At page 5a, the W. Va. Supreme Court stated:

> "Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we agree with Ms Pritt that genuine issues of material fact do preclude the disposition of this matter by summary judgment."

Starting at page 9a, The West Virginia Supreme Court devoted one full section of its decision to the standard of review required for the case:

> "STANDARD OF REVIEW
>
> The instant appeal comes to this Court from decisions of the circuit court granting summary judgment in favor of RNC and denying Ms. Pritt's post-judgment motion.

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[17] Designated Record to the West Virginia Supreme Court at page 41.

> We typically apply a plenary review to an order of a circuit court deciding a summary judgment motion. "A circuit court's entry of summary judgment is review *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 451 S.E.2d 755 (1994). Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law."

See also page 15a:

> "With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury."

Including the three instances above, the West Virginia Supreme Court decision refers to their review of the record a total of six times. They also recite certain evidence taken from the record. This hardly sounds like they failed to conduct an independent review of the record before making their decision.

The proposition that the United States Supreme Court should grant certiorari to protect the First Amendment at this time is without merit. This case does no violence to the First Amendment nor does it threaten to do so. It is necessary to allow

the case to be fully developed to allow the measuring of the Respondent's Fourth Amendment rights against the First Amendment claim.

The First Amendment , part of the "Bill of Rights", is analogous to the English "Magna Charta" of 1215 and the English "Bill of Rights" of 1689. These three documents were written and designed to protect the people from action by the government; the Crown in the case of the England and the Federal Government in the case of the United States. The First Amendment was originally written and designed to give the citizens of the United States (the people) the freedom to speak their mind without fear of reprisal from the Federal government. **The First Amendment is not now, never has been, nor ever was intended to be a "license to lie".** It was never intended to deprive individuals of their right to defend their reputations in actions of libel.

Petitioner, NRSC, includes excerpts of the "record" which they contend demonstrates that the "Ads opposing Pritt" are true. These excerpts and their comparison with the "Ads opposing Pritt" shows that the "Ads" are **literally false.** The following response to the NRSC's Petition is parallel numbered.

1. To show that the allegation **"In the State Senate, Charlotte Pritt proposed teaching first graders about condoms"** is true, the NRSC refers to Senate Bill 531. (See page 20 of the NRSC's Petition).

Respondent was approached by her constituents about legislation of this nature and were sent to the Legislative Services to prepare the bill. The result, Senate Bill 531, which Respondent did not draft but did sponsor. Comparing the language of the "condom allegation" with the language of Senate Bill 531 shows the allegation is **literally false.** There is no mention of "teaching first graders about condoms". What was to be taught was to be determined by the school boards and approved by the parents. There was no such proposal by Respondent.

> "[T]he state board of education shall cause to be taught in all of the public schools of this state the subject of human growth and development, including the social aspects, contraception, diseases and *all other special instruction deemed appropriate and necessary by the state board. The state board shall determine the necessary time of instruction of human growth and development which shall be provided to grades kindergarten through twelve. Textbooks on the subject of human growth and development adopted for use in the public schools of the state shall contain appropriate material for teaching that subject.*
>
> *An opportunity shall be afforded to the parent or guardian of a child subject to instruction of the human growth and development course to examine the course curriculum requirements and materials to be used in such instruction.* (Underscore/italics provided).

It is absurd to conclude that the various school boards and the parents, all of whom would be involved in the decision making process, would determine that Bill 531 was a proposal for "teaching first graders about condoms." It is absurd to contend that proposed Bill 531 could truthfully be interpreted to be a proposal by Respondent for " teaching first graders about condoms."

The Uniform Statute and Rule Construction Act § 18(a) states: "A statute or rule is construed so as to avoid an unconstitutional, absurd, or unachievable result." *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100 (1997) notes "It is a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided."

At page 21 the NRSC is "boot strapping" it by distorting Respondent's deposition and suggest that she agreed that "sex education" for first graders included "instruction on 'contraception'".

2. At page 22 the NRSC cites Respondent's 1990 vote against an amendment to Senate Bill 184 to support the allegation that she "voted to permit the sale of pornographic Videos to children." This is a misinterpretation of the phrase "video movie which is rated 'X'". In 1990, "X" rated movies by the Movie Industry were the equivalent of today's PG-17 movies and were not pornographic. In 1990, "XXX" movies were considered as pornographic. The television version of this "pornographic allegation" completes the deception of this allegation with a subliminal back drop that shows a red "XXX".

3. At page 22, the NRSC cites a vote by Respondent against a proposed amendment to Senate Bill 639 as proof of the truthfulness of the allegation that "She even voted to allow convicted drug abusers to work in our public schools." This is literally false. No mention of the employment of "drug abusers in the public schools" is mentioned in the amendment. The false distortion of the meaning of her vote on this amendment is further apparent by the fact that **a majority of the Senate voted with her against this amendment.** It is absurd to say that the W.Va. Senate voted to allow the employment of "drug abusers in the public schools."

4. At page 23, the NRSC makes a bizarre effort to justify the conclusion that "... parents can't trust Charlotte Pritt to protect our children..."

On deposition, David Welch simply explained that since Charlotte Pritt had (1) proposed the teaching about condoms to first graders, (2) had voted for the sale of pornographic videos to children and (3) had voted to allow drug abusers to work in the public schools, parents couldn't trust her to protect their children. This allegation is based on the absurd, false distortions of the Respondent's legislative record.

Charlotte Pritt is a school teacher. **The allegation that "parents can't trust Charlotte Pritt to protect our children" is libel *per se.***"

5. At page 24, the NRSC relies on Respondent's vote against Concurrent Resolution 4

(CR 4) to support the allegation "**Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War.**"

CR 4 was a Resolution by the Senate that, in January of 1991, encouraged then President Bush to take steps to restore self government to Kuwait. The Senate Journal preliminary language, on page 57, dated January 14, 1991, is as follows:

"**House Concurrent Resolution No. 4**—Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East."

The portion of CR 4 which the NRSC refers to was an amendment to the original resolution. The purpose of CR 4 was not to "honor the men and women of West Virginia who fought in the Gulf War". This language in the CR 4 was superfluous and was added to encourage passage of the Resolution. Respondent voted against U. S. Military involvement in the Mid-East, not against honoring the West Virginia Service men and women.

Later, the Gulf War situation was revisited by Legislature in February, 1992. House Joint Resolution No. 109 (HJR 109), a Veteran's Bonus, most of which went to the Gulf War veterans, was passed by the Legislature. Respondent voted for and spoke in favor of this bonus.

This is another example of deception by omission. To reach the conclusion presented by the

"Gulf war allegation", Petitioners selectively ignored the real purpose of CR 4 and ignored Respondent's vote for HJR 109 which "honored" the Gulf War Veterans by giving them a bonus.

6. At page 26, the NRSC distorts the effect of Senate Resolution 31 (SR 31). This resolution was not intended to "**allow** the burning of the American Flag". Quite simply, it was intended to ultimately lead to "criminalization" of the burning of the Flag. Prior to this the Court had addressed this question in the case of *Texas v. Johnson*[18] where the Court said the "burning of the flag...is expressive conduct" protected under the First Amendment freedom of speech. The question before the Senate was not the "allowing of the burning of the Flag" The question was whether to pass a resolution which would have encouraged the criminalizing of the burning of the flag.

7. At page 27, the NRSC refers to Respondent's vote against House Bill 1193 (HB 1193). This Bill made it mandatory for "the Pledge of allegiance to the United States flag in public schools at the start of every instructional day". It also exempted students who for religious or moral reasons felt they could not make this pledge. An amendment was proposed that excused teachers on the same basis on which students were excused. The Respondent voted for this amendment but it was defeated. Respondent voted against the bill since it did not provide for excusing the teachers. Delegate

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[18] *Texas v. Johnson*, 491 U.S. 397 (1989).

Casey spoke explaining the vote against the Bill was because to "require the teachers to participate is unconstitutional in addition to being illogical".

VII. *SPROUSE V. CLAY COMMUNICATIONS:*

The Petitioners cite a total of 94 decisions in their Petitions, including 29 citations that involve state court decisions. One decision, *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d. 426, is noticeable absent, notwithstanding that this decision was cited in all prior briefs by the Petitioners.

Sprouse was an attorney with approximately 17 years experience. He was the Democratic nominee for governor in 1968. On the eve of the election the Charleston Daily Mail (Daily Mail), owned by Clay Communications, Inc., fabricated and published a series of false negative articles about Sprouse that libeled, slandered and defamed him. The Daily Mail had many readers in Fayette County and was widely distributed throughout the state.

Sprouse brought a libel action in state court (Circuit Court of Fayette County, West Virginia).

Sound familiar?

After a jury trial, Sprouse prevailed and judgment was entered for the jury award. Clay Communications appealed resulting in the decision cited above. Clay Communications petitioned the United States Supreme Court for a writ of certiorari. The American Newspaper Publishers Association were granted leave to file an *amicus* brief. A writ of certiorari was denied. See 423 U.S. 882.

Sprouse was one of the first decision to determine that *New York Times v. Sullivan* applied to a candidate for public office. It was also one of the first decisions requiring that "actual malice" be proven by "clear and convincing evidence". *New York Times v Sullivan* involved elected law enforcement officials who were granted a jury award against the *Times*. The *Times* decision did not use "clear and convincing" but instead concluded "lacks the convincing clarity which the constitutional standard demands".[19]

The *Sprouse* decision is so parallel to our present fact scenario that is unconscionable to omit discussion of it in a brief concerning this case.

VIII. CONCLUSION:

Respondent concludes with the following:

(1) The West Virginia Supreme Court' decision is not a "final Judgment" as contemplated by 28 U.S.C. § 1257(a).

(2) There is no "compelling reason", as contemplated by Rule 10, for the Court to review this case by granting certiorari.

(3) The RNC and NRSC Petitions do not fairly portray the West Virginia Supreme Court decision and are misleading.

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[19] *New York Times v. Sullivan*, 376 U.S. 254, 285/286 (1964)

(4) The NRSC Petition does not accurately portray the "facts" of this case and is misleading.

(5) A writ of certiorari should not be granted on speculation by the Petitioners that there may, in the future, be some violation of their rights protected under the First Amendment.

(6) The "Ads opposing Pritt" were not "robust political discussion" as protected by the numerous First Amendment decisions. These "Ads" were pure, unadulterated character assassination of a candidate for a state office, by a national political organization that had unlimited funds, in an effort to control a state election.

(7) The proof of falseness of the "Ads opposing Pritt" is demonstrated by: (a) Comparison of Respondent's record with the "Ads", (b) Respondent's point by point response to the NRSC at pages 21 through 27, (c) the testimony of witnesses Withers and Sattes which was improperly excluded by the lower court and (d) the testimony of Respondent.

(8) The proof of "actual malice" is demonstrated by (a) David Welch's admission that he only used the part of Respondent's record that would be of interest to the Petitioners, (b) the refusal by the Petitioners to consider terminating the "Ads opposing Pritt" when requested to do so by her opponent (c) the pattern of deception surrounding the broadcasting of the "Ads" which destroys the credibility of the Petitioners and supports the conclusion that they did

know the "Ads" were false or did publish them with willful disregard of their truth or falsity.

(9) It is necessary to let the subject case go forward and allow the parties to fully develop their portions of the case in order to protect the Respondent's rights under the Fourth Amendment.

(10) Petitioners' position that greater weight should be given to the Circuit Court's decision granting Summary Judgment than the decision by the West Virginia Supreme Court reversing that decision and remanding for trial is unfounded.

(11) The "guidance" set forth in the West Virginia Supreme Court's decision assures that the case will be tried under the applicable law as found in the various decision by the United States Supreme Court. This case does not threaten to do any violence to the First Amendment.

For the foregoing reasons, a writ of certiorari, summarily reversing the judgment of the West Virginia Supreme Court, should **not** be granted.

Respectfully submitted,

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